

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**TYSON FOODS, INC., et al.,**

**Defendants.**

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**Case No. 05-CV-329-GKF-PJC**

**STATE OF OKLAHOMA'S REPLY TO TYSON FOODS, INC.'S OPPOSITION TO  
PLAINTIFFS' [SIC] MOTION FOR PARTIAL SUMMARY JUDGMENT –  
STATEMENT OF UNDISPUTED FACTS (DKT. NO. 2062)**

The State of Oklahoma (“the State”) respectfully submits the following reply to “Tyson Foods, Inc.’s Opposition to Plaintiffs’ [sic] Motion for Partial Summary Judgment – Statement of Undisputed Facts (Dkt. No. 2062)” (“Response”). Dkt. #2199-2.

**A. MSJ Statements of Undisputed Fact Nos. 42, 47 & 48**

Tyson expressly admits that “phosphorus is contributed to stream water during high-flow events from point **and non-point sources.**” Resp., ¶ 42 (emphasis added).<sup>1</sup> This admission is especially important for the purposes of the State’s causation case when considering Tyson’s failure to genuinely dispute other significant facts set forth in the State’s Motion for Partial Summary Judgment (“MSJ”). Perhaps the most significant portions of the State’s MSJ are Statements of Undisputed Fact Nos. 47 and 48 -- yet, Tyson barely responds. First, Tyson provides *no evidence* contrary to the State’s supported statement -- in Fact No. 47 -- that “Defendants have long been aware that the land application of poultry waste in the IRW presented a serious risk of potential environmental impact due to run-off and leaching.” *See* MSJ, Facts, ¶ 47; Resp., ¶¶ 47-8. Thus, Tyson, and Defendants adopting its Response, have confessed this crucial fact.

In Fact No. 48, the State sets out extensive evidence from diverse sources -- governmental entities, non-retained experts, Defendants and the State’s retained experts -- confirming that “phosphorus contained in the poultry waste generated by Defendants’ birds that has been land applied in the IRW can, and does, run off and leach into the waters of the State . . .” MSJ, Facts, ¶ 48 (emphasis added). However, Tyson has provided *no evidence* to support its

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<sup>1</sup> Dr. Sullivan’s finding cited by Tyson, *see* Resp., ¶ 42, that phosphorus concentrations are higher downstream from wastewater treatment plants (“WWTP”) is a red herring. Logically, the contributions of WWTPs are *in addition to* the admitted contributions of nonpoint sources, including poultry waste, the dominant source of phosphorus loading in the IRW. *See, e.g.*, Ex. 3 (Chaubey Depo. at 74-5).

contention that the government agency reports and testimony of non-retained experts provided by the State are “not supported by any evidence demonstrating the movement of phosphorus in the IRW.” Resp., ¶ 48. The only “evidence” Tyson cites in support of this proposition consists of four pages from the expert report of one of its retained experts, Dr. Sullivan. *Id.* (citing “Ex. 36 at 114-17”). The portions of Dr. Sullivan’s report Tyson relies upon take issue with the opinions of certain of the State’s retained experts but make *no mention whatsoever* of the authoritative governmental reports and non-retained expert testimony cited by the State. *See* Dkt. #2210-2 (Sullivan Rpt. at 114-17).<sup>2</sup> Therefore, Tyson has not disputed any of the findings by governmental authorities or non-retained experts which show that land applied poultry waste is a substantial contributor to phosphorus pollution found in the waters of the IRW.

For instance, Tyson provides no evidence to oppose USDA’s findings that “[w]ater quality problems in the Tenkiller and Spavinaw watersheds are due to excessive nutrients, pathogenic bacteria, and sedimentation” and that the practice of land applying poultry waste “has led to the excessive buildup of phosphorus that currently pollutes waterbodies” in the IRW. MSJ, Facts, ¶ 48(a). Nor does Tyson directly challenge the cited testimony of Randy Young, Executive Director of the Arkansas Natural Resources Commission, that “without question . . . the land application of poultry waste is a significant part of [the water quality problems in the IRW].” *See* Dkt. #2103-3 (Young Depo. at 209-10). And Tyson provides no response to the Arkansas Water Resources Center’s determination that “[n]onpoint source impacts affecting waters in [the IRW] are primarily from pastureland that is also used for application of poultry litter as fertilizer.” MSJ, Facts, ¶ 48(a).

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<sup>2</sup> While Tyson later claims that USGS data from the IRW is “flawed,” *see* Response, ¶ 49, Tyson does not provide the Court with the pages from Dr. Sullivan’s Report that it is relying on to make this claim. *See* Dkt. #2210-2 (omitting pp. 68-71 and 23-4).

Tyson's attempt to dispute the admissions and statements of Defendants is also unavailing. For example, Tyson quotes former Peterson executive Ron Mullikin who stated in a 1998 memo that "[a]gronomists can't agree on the movement of phosphate . . . ." Dkt. #2070-9 at 1. However, in that same memo, Mr. Mullikin wrote: "I do feel, without any doubt, that as time passes we the integrator will be found to be liable for *[poultry waste] and the affect [sic] it has on our environment.*" *Id.* (emphasis added). Also, while Tyson claims the admissions of fact made by George's President and COO (Monty Henderson) (*e.g.*, "During major rain events some of the phosphorus becomes soluble and washes off into the streams and lakes.") do not apply to the IRW, nothing in his statement, MSJ Ex. 111, indicates that his admissions would not apply to the IRW. *See* Dkt. #2103-5 (GE35775). On the contrary, Mr. Henderson's admissions in MSJ Ex. 111 expressly apply to "concentrated poultry areas" (*see Id.*), and Mr. Henderson has conceded that the IRW has a "concentration of poultry operations." Ex. 2 (M. Henderson Depo at 79). Tyson also asserts that the State "misrepresented," *see* Resp., fn 94, the testimony of former Tyson employee Preston Keller in Fact No. 48; but the State was directly quoting a PowerPoint slide which Mr. Keller wrote stating that "phosphorus is mobile, causes water quality problems and accumulates in the soil." *See* Dkt. #2099-2 (Keller Depo at 86-7).<sup>3</sup>

Lastly, contrary to Tyson's critique, the State is not required to present direct evidence tracing or tracking the phosphorus in the waters of the IRW to a precise field where poultry waste has been land applied. *See, e.g., Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir.

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<sup>3</sup> While Mr. Keller did claim in his deposition that phosphorus only causes water quality problems when poultry waste is "mismanaged," he defined "mismanaged" as "[o]ver application." *See* Dkt. #2099-2 (Keller Depo. at 87-8). Tyson, through its counsel, admits that there has been overapplication of poultry waste within the IRW. Dkt. #2081-7 (Ryan P.I. Opening at 46).

2000); *see also*, State’s responses to Defendants’ and Cargill Defendants’ MSJs re Causation, Dkt. #2182 & #2178. Thus, this criticism is irrelevant. In sum, despite their importance, Tyson has not genuinely or materially disputed Statement of Undisputed Facts Nos. 47 and 48.

## **B. Evidentiary Issues**

### **1. Dr. Chaubey**

Dr. Indrajeet Chaubey (“Dr. Chaubey”) testified that: (a) “there will always be some losses taking place from the areas . . . treated with the poultry waste”; and (b) “[p]oultry litter is the biggest source of nutrients [in the IRW] when you look at all the sources, and given that fact and given the fact that it runs off the fields, it will be logical to conclude that significant amount of phosphorus in the [Illinois] river is coming from the areas that are treated with poultry litter.” *See* MSJ, Facts, ¶ 48(b) (citing Chaubey Depo. at 163-64, 168 & 192) (emphasis added). Dr. Chaubey has also testified that: the primary method of disposal of poultry waste is land application; high STP levels are indicative of application of poultry waste in excess of agronomic need; and poultry waste is the dominant source of phosphorus in the watershed. *Id.* at ¶¶ 28, 39 and 44 (citing Chaubey Depo. at 32-33; 74-75 & 175-76).

Rather than responding to the substance of Dr. Chaubey’s testimony, Tyson argues that his testimony is inadmissible because his opinions were not disclosed pursuant to Fed. R. Civ. P. 26(a) and “he is not testifying about pre-litigation work he performed in the IRW, and thus cannot qualify as an unretained expert.” Resp. at fn ## 54, 62, 72, 72, 75, 83, 87 & 92. This argument is truly baseless. Dr. Chaubey is the classic non-retained expert and his opinions are wholly based on his independent research conducted entirely outside the confines of this litigation.

Under Rule 26(a)(2)(B), a written expert report must be prepared by “a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.” The 1993 Advisory Committee Notes state: “The requirement of a written report in paragraph (2)(B) . . . applies **only** to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report” (emphasis added). Chief Judge Eagan’s Opinion and Order on a motion to exclude in *B.H. v. Gold Fields Mining Corporation*, 2007 WL 128224 (N.D. Okla. January 11, 2007), provides a pertinent and detailed analysis of the retained versus “non-retained” expert question. The subject motion to exclude in *B.H.* involved Dr. Robert Lynch, a professor of environmental science at the University of Oklahoma.

There, the defendants moved to exclude Dr. Lynch for failure to provide a written report, arguing that Dr. Lynch was “retained” to provide expert testimony, “in that he ha[d] no knowledge of the facts of the underlying cases, and ha[d] been asked by Plaintiffs’ counsel to provide testimony that falls within Rule 702.” *B.H.*, 2007 WL 128224 at \*1. In denying the motion to exclude, Judge Eagan held and reasoned as follows:

- “Although evidence that a party was not paid to testify suggests he was not retained, this fact alone is not dispositive of the issue. *Brown v. Best Foods*, 169 F.R.D. 385, 388 n. 3 (N.D.Ala. 1996).”
- “A key factor in the Court’s consideration is how plaintiffs’ counsel initially formed a relationship with the witness, such as whether the witness was asked to reach an opinion in connection with specific litigation. *Kirkham v. Societe Air France*, 236 F.R.D. 9, 12 (D.D.C. 2006).”
- “Defendants have presented no evidence that Dr. Lynch routinely provides expert services as part of his work or that he reached any opinion ***specifically in connection with this litigation.*** *Prieto v. Malgor*, 361 F.3d 1313, 1318-19 (11th Cir. 2004).”

- Dr. Lynch “began his [pertinent] research...almost 8 years [be]for[e] th[e] *B.H.* case was filed.”
- Dr. Lynch “has not received any compensation for giving an opinion in this case, nor does it appear that he will be paid for testifying at trial.”
- “Although Dr. Lynch’s opinions may be harmful to defendants, he has not been asked to testify to support the credibility of plaintiffs’ retained experts, as [the expert] was in *Herd v. Asarco, Inc.*, 01-CV-0891-SEH-PJC (N.D.Okla.).”
- “In summary, there is no basis for the Court to conclude, from the nature of Dr. Lynch’s proposed testimony or the circumstances leading to his identification on plaintiffs’ preliminary witness list, that he was “retained or specially employed” to testify as an expert in this case.”

*B.H.*, 2007 WL 128224, \*3-4 (emphasis added).

For over fifteen years, Dr. Chaubey’s<sup>4</sup> primary area of study and research has been runoff (including poultry waste), transport processes in agricultural watersheds, and their effect on water quality. *See* Dkt. #2182-6 (Chaubey Depo. at 21-24). Pertinently, during many years at the University of Arkansas and beyond, Dr. Chaubey has extensively researched water quality issues in the IRW. *Id.* at 24-28. And the very testimony cited by Tyson in its Response only confirms that Dr. Chaubey is a non-retained expert for the purposes of Rule 26(a)(2)(B). For instance, Dr. Chaubey has not been paid by either side to testify in this case. *See* Resp., fn 54; Dkt. #2209-24 (Chaubey Depo at 8). Further, the State has not requested that Dr. Chaubey arrive at any opinion specially for the purpose of this case, but has merely called upon his scientific expertise based upon work he has already done. *Id.* During his deposition, Dr. Chaubey gave additional, extensive testimony proving that *all* of the opinions given in this case are derived from his own study and research -- completely independent of this litigation. *See* Dkt. #2182-6 (Chaubey Depo. at 7-13). Dr. Chaubey’s testimony is indisputably admissible. He

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<sup>4</sup> The State expressly disclosed Dr. Chaubey as a “nonretained” expert as part of an April 1, 2008 letter to Defendants. *See* Ex.1 (4/1/08 Expert Disclosure at 4).

is plainly a non-retained expert under Rule 26(a)(2); and thus, he was not required to provide an expert report. While Tyson obviously recognizes that Dr. Chaubey's testimony "may be harmful" to Defendants' case, it has provided this Court with no valid basis to exclude his testimony.

## **2. Judicial Admission by Counsel for Tyson**

As part of its MSJ, the State relies on a significant admission made by counsel for Tyson during Defendants' opening statement at the hearing on the State's Motion for Preliminary Injunction (*see* MSJ, Facts, ¶¶ 28 & 39) in which counsel for Tyson stated: ". . . I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book." Dkt. #2081-7 (Ryan P.I. Opening at 46). Tyson argues that this statement by counsel is inadmissible as it does not constitute evidence. Resp., ¶¶ 28 & 39; and fn ## 54 & 76. Tyson's argument in this regard is contrary to law.<sup>5</sup> This statement by counsel clearly constitutes a "judicial admission." *See U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 fn 4 (10th Cir. 2005) ("Judicial admissions are formal, deliberate declarations which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute."). Such an admission made by a party's counsel during an opening statement is binding against that party. *See United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986). Counsel's statement concerning the "overapplication of litter" was a deliberate admission made to dispense with proof during a

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<sup>5</sup> Tyson attempts to explain away counsel's admission as referring "only to the fact that Oklahoma approves litter-management plans that authorize the application of litter at rates that exceed the amounts that Plaintiffs claim are excessive." Resp., ¶ 28. This explanation lacks any credibility as it bears no resemblance to what counsel actually said during the opening statement.



formal proceeding. Defendants should be bound by this judicial admission for the purposes of deciding the State's MSJ.<sup>6</sup>

### C. No Genuine or Material Dispute

Tyson fails to controvert other significant facts set forth in the State's MSJ. For instance, Tyson provides no evidence to contradict the State's supported statements that:

- The largest contributor to the increased phosphorus concentrations during high-flow events is from non-point sources, Resp., ¶ 43; MSJ, Facts, ¶ 43;
- The "vast majority of poultry waste generated by Defendants' birds is and has been land applied throughout the IRW in close proximity to where it is generated," *Id.* at ¶ 30;<sup>7</sup>
- Cattle recycle existing nutrients in the IRW, *Id.* at ¶ 45;<sup>8</sup> and

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<sup>6</sup> Tyson also repeatedly objects to the State's presentation of facts on the basis that it is: vague, overbroad and argumentative, contains improper legal conclusions or is not supported by the cited evidence. *See* Resp., *passim*. The State asserts that these objections are themselves vague as Tyson fails to offer specific argument in support of them. The State's presentation of facts and supporting evidence in the MSJ is clear and concise, and Tyson has not provided any meritorious argument to the contrary.

<sup>7</sup> While Tyson cites to page 5 of Dr. Clay's Report, *see* Resp., fn 63, in support of the argument that "'vast majority of poultry litter' is not applied in close proximity to where it is created," Dr. Clay has made no such finding. *See* Dkt. #2209-16 (Clay Rpt. at 5). The testimony of Dr. Fisher that Tyson cites, *see* Response, fn 63, states that 80 percent of the poultry waste generated in the IRW is disposed of within 3.6 miles of where it originated. *See* Dkt. #2209-17 (Fisher Depo. at 159-60). Steve Butler's testimony, *see* Resp., fn 63, is anecdotal and shows that only a "very little small percentage" of the poultry waste from the BMPs, Inc. hauling program is trucked to Kansas and Missouri. *See* Dkt. #2183-9 (S. Butler Depo. at 108). Randy Young, *see* Resp., fn 63, provides no information about the amount of poultry waste -- if any -- that is hauled outside of the IRW. *See* Dkt. #2209-22 (Young Depo. at 210). Rausser and Dicks, *see* Resp., fn 63, Defendants' own experts, admit that they do not know what percentage of poultry waste is transferred outside of the IRW. *See* Dkt. #2193-4 (R&D Rpt. at 58). Even accepting Tyson's statement that 70,000 tons of poultry waste are exported annually from the IRW, *see* Resp., ¶ 32, this is only 20% of the total of 354,000 tons of poultry waste annually generated in the IRW (as estimated by Engel/Fisher). Further, Dr. Fisher testified that the land application data he relied upon from ODAFF under-reports the actual instances of land application and that his estimates are "the best anyone can do." *See* Dkt. #2076-2 (Fisher Depo. at 187-89; 192-93).

<sup>8</sup> While Tyson cites to § 2.5 of Dr. Connolly's Report in support of the proposition that cattle represent a "major NPS pollutant transport mechanism" and "an important source of NPS pollutants to streams," the referenced exhibit does not include § 2.5 of the Connolly Report. *See* Dkt. #2209-46.

- The “surface water and groundwater of the IRW” are “highly susceptible to pollution from phosphorus from land applied poultry waste because of the terrain and geology of this area, the manner of land application, and the nature of poultry waste.” *Id.* at ¶ 46.<sup>9</sup>

Additionally, Tyson raises no genuine or material dispute as to: (1) the State’s estimates of the amount of poultry waste annually generated in the IRW. MSJ, Facts, ¶ 22; Resp., ¶ 22;<sup>10</sup> (2) the State’s estimated amounts of poultry waste generated annually by *each* Defendant, *id.* at ¶ 24;<sup>11</sup> (3) the fact that “poultry waste generated by Defendants’ birds has no beneficial use *in the poultry growing / feeding process*; it is not reused, recycled or reclaimed *for feeding or growing poultry*,” *id.* at ¶ 25;<sup>12</sup> (4) the fact that poultry waste is the dominant source of phosphorus loading in the IRW, *id.* at ¶ 44;<sup>13</sup> and (5) the fact that the evidence does not show that “litter is

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<sup>9</sup> Instead of providing contrary evidence, Tyson asserts that the State must make an assessment of “susceptibility” on a field-by-field basis. Resp., ¶ 46. Such a piecemeal level of direct proof is not required. *See, e.g., Union Tex. Petroleum Corp.*, 909 P.2d at 149-50; *Tosco*, 216 F.3d at 892.

<sup>10</sup> The State has provided a range of waste volume estimates from varied sources, including USDA and the Arkansas Soil and Water Conservation Commission. *See* MSJ, Facts, ¶ 22. The *lowest* estimate presented by the State (354,000 tons) came from its retained experts, Drs. Engel and Fisher. *Id.* Defendants’ expert, Dr. Billy Clay, estimates that 295,114 or 307,700 tons of poultry waste is generated annually in the IRW. Dkt. #2209-16 (Clay Report at 17). Further, Dr. Clay has cited to Engel/Fisher’s estimate of 354,000 tons, without stating that this estimate is incorrect. *Id.*

<sup>11</sup> Neither Dr. Storm nor Dr. Clay has estimated poultry waste amounts by Defendant. Dr. Clay actually cites to the Engel/Fisher aggregate estimate of 354,000 tons, and himself estimated that 307,000 tons of poultry waste is annually generated in the IRW. Dkt. #2209-16 (Clay Report at 17).

<sup>12</sup> Tyson only asserts that poultry waste may have beneficial use in contexts other than in the poultry growing/feeding process. Response, ¶25.

<sup>13</sup> Again, Tyson’s objection as to the admissibility of Dr. Chaubey’s testimony is without merit. *See* § B.1, *supra*. Tyson’s objection to the admissibility of Dr. Smolen’s testimony on hearsay grounds is similarly weak. *See, e.g., Black v. M&R Gear Co.*, 269 F.3d 1220, 1227-29 (10<sup>th</sup> Cir. 2001). The State’s causation case is circumstantial, and the State is not required to “track” phosphorus in the waters of the IRW to a precise field. *See, e.g., Union Tex. Petroleum Corp.*, 909 P.2d at 149-50; *Tosco*, 216 F.3d at 892. Tyson’s challenge of Ms. Smith’s mass balance is based solely on cited transcript pages, *see* Response, ¶ 44 (citing “Ex. 38 at 95-98”), which Tyson did not provide to the Court. *See* Dkt. #2209-31. In the Connolly testimony cited by Tyson, *see* Resp., fn 86, he acknowledges that non-point source runoff is “significant,” but claims that phosphorus from wastewater treatment plants is more important. Dkt. #2100-3

applied in the IRW consistent with state laws” or in a “manner constituting normal application of fertilizer.” *See* Resp., ¶¶ 39 & 40.<sup>14</sup> Also, while Tyson attempts to deny that Defendants control most vital aspects of the growers’ operations (Response, ¶¶ 10 & 12), the very evidence cited by Tyson proves otherwise.<sup>15</sup>

WHEREFORE, premises considered, the State respectfully requests that this Court grant its Motion for Partial Summary Judgment over the objections of Defendants.

Respectfully submitted,

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(Connolly Depo. at 107). The USGS document cited by Tyson, *see* Resp., fn 86 (“Pls. Ex. 88”), provides that “[p]hosphorus concentrations in Ozark streams are typically greater in streams draining agricultural lands . . . because runoff from pastures fertilized with animal manure are probably substantial sources of phosphorus to the rivers in [the] [IRW] . . . .” *See* Dkt. #2100 (USGS (2006) at 4). While Defendants’ experts claim that wastewater treatment plants are the most significant source of phosphorus concentrations in the waters of the IRW, none of them claim that poultry waste is not a source. *See, e.g.*, Dkt. #2100-3 (Connolly Depo. at 107); #2209-46 (Connolly Rpt., § 2.9); #2209-47 (Jarman Rpt. at 6-7).

<sup>14</sup> Tyson’s Chief Environmental Officer testified that he does not know whether Tyson’s growers in the IRW are following their plans and that Tyson does not monitor whether its growers are complying with their plans. Ex.4 (Igli Depo. at 63 and 74). Aside from its meritless evidentiary objections regarding Dr. Chaubey and Tyson’s counsel, Tyson does not dispute the State’s evidence of the over application of poultry waste or evidence that high STP levels indicate the over application of poultry waste. Resp., ¶39. The testimony of Dr. Fisher cited by Tyson, *see* Resp., fn 77, shows that the contamination of the waters of the IRW is an indivisible injury that cannot be traced to any particular field or instance of land application. *See* Dkt. #2209-17 (Fisher Depo. at 560). Ms. Gunter, *see* Resp., fn 77, identifies clear violations of State law, including the unprotected piling of poultry waste. *See* Dkt. #2209-33 (Gunter Depo at 57-61). And while Dan Parrish stated that he was not aware of any poultry operator in violation of a plan, he clarified that ODAFF does not have enough staff to make that determination. Dkt. #2209-31 (Parrish Depo. at 259). Further, the State does not “authorize” any land application of poultry which causes runoff or creates an environmental or health hazard. *See* 2 Okla. Stat. §§ 10-9.7(B)(4)(a) & (b); (C)(6)(c). Tyson fails to genuinely dispute the State’s evidence of over application of poultry waste in a manner not constituting the normal application of fertilizer. *See* MSJ, Facts, ¶¶ 30-33; 35-39.

<sup>15</sup> *See* Dkt. #2065-10 (Dicks Depo. at 115; 118); #2065-7 (McClure Depo. at 133) (no negotiations); 2066-3 (same); #2070 (Alsup Depo at 56-7) (barn and equipment specifications); #2066-6 (Butler Depo. at 44) (same); #2065-11 (Pilkington Depo. at 22) (same); #2183-3 (PI Tr. at 1355-56).

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**CERTIFICATE OF SERVICE**

I certify that on the 19th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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